

**In the Supreme Court of the United States**

**October Term, 1923.**

---

**THE BALTIMORE AND OPEO RAILROAD COMPANY,**  
*Petitioner,*

**vs.**

**Freda Granger, Administratrix of the Estate**  
**of John C. Granger, Deceased,**  
*Respondent.*

---

**BRIEF OF RESPONDENT IN OPPOSITION TO**  
**PETITION FOR WRIT OF HABEAS CORPUS**

---

**FRANK M. CONANT**  
**vs. G. GRANGER**

*Attorney for Respondent*

---

No. ....

---

---

# In the Supreme Court of the United States

OCTOBER TERM, 1923.

---

THE BALTIMORE AND OHIO RAILROAD COMPANY,  
*Petitioner,*

vs.

FREDA GROEGER, Administratrix of the Estate  
of John C. Groeger, Deceased,  
*Respondent.*

---

---

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

---

---

FRANK M. COBB AND  
E. C. CHAPMAN,  
*Attorneys for Respondent.*

---

---



No. ....

# In the Supreme Court of the United States

OCTOBER TERM, 1923.

---

THE BALTIMORE AND OHIO RAILROAD COMPANY,  
*Petitioner,*

vs.

FREDA GROEGER, Administratrix of the Estate  
of John C. Groeger, Deceased,  
*Respondent.*

---

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

---

The respondent, Freda Groeger, administratrix, begs leave to submit the following brief in opposition to the petition and motion for writ of certiorari.

### FACTS.

The parties are designated herein as they stood in the District Court below, Freda Groeger, Administratrix, plaintiff, vs. The Baltimore & Ohio Railroad Company, defendant. The case is an action under the Federal Employers' Liability Act and the Federal Boiler Inspection Act, brought by plaintiff as administratrix of the estate of John C. Groeger, deceased, to recover damages for the alleged wrongful death of said Groeger, who was employed by defendant as a locomotive engineer.



Plaintiff's decedent on the morning of September 3, 1920, left Holloway, Ohio, acting as engineer of locomotive engine No. 2541 of the defendant with a train of cars for Brooklyn Junction, West Virginia, crossing the Ohio River near Wheeling and continuing by way of Moundsville, Chestnut Hill, Foster's Tower, through a point near Proctor (all in West Virginia), some three miles beyond Foster's Tower, where the locomotive boiler exploded, causing the death of the engineer, the fireman and the head brakeman,—all of the crew on board the engine at the time. After leaving Holloway the engine took on water at several points prior to the explosion, the last time being at Foster's Tower, about three miles from the scene of the explosion. Water from the tank of the engine was supplied to the boiler by means of the injectors on the engine. The engine when last seen just before reaching Foster's Tower and at Foster's Tower was being supplied with water by one or both injectors. (Record, pp. 15 and 32.) At a point near Proctor, while on a practically straight and level track, the boiler of the engine exploded. Admittedly, the engine was being used in interstate commerce and the law applicable to the case was governed by the Federal Employers' Liability Act and its amendments and the Boiler Inspection Act and its amendments, particularly the amendment of 1915, and by the orders of the Interstate Commerce Commission authorized under the Boiler Inspection Act. The Boiler Inspection Act provides as follows:

“An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto.

Section 1. The provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employees, engaged in the transportation of passengers or property by railroad in the District of Columbia, or in any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term 'railroad' as used in this act shall include all the roads in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and the term 'employees' as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.

Sec. 2. From and after the first day of July, nineteen hundred and eleven, *it shall be unlawful* for any common carrier, its officers or agents, subject to this act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereof are in *proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb*, and all boilers shall be inspected from time to time in accordance with the provisions of this act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

"Amendment of 1915 to Federal Boiler Inspection Act.

Sec. 1. That section two of the Act entitled 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers

engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto,' approved February seventeenth, nineteen hundred and eleven, shall apply to and include the *entire locomotive and tender and all parts and appurtenances thereof.*"

By virtue of the law the Interstate Commerce Commission is authorized to make rules and orders which constituted part of the law. The use of a fusible plug is contemplated in some measure at least by reason of its rule or Order No. 14, which provides as follows:

"14. *Fusible plugs.*—If boilers are equipped with fusible plugs they shall be removed and cleaned of scale at least once every month. Their removal must be noted on the report of inspection."

Rule 25 provides as follows:

"25. *Broken staybolts.*—No boiler shall be allowed to remain in service when there are two adjacent staybolts broken or plugged in any part of the firebox or combustion chamber, nor when three or more are broken or plugged in a circle 4 feet in diameter nor when five or more are broken or plugged in the entire boiler."

The case of *Great Northern Railway Company vs. Donaldson*, 246 U. S. 121 (89 Wash. 161) was the case relied upon by the trial court; was the only case cited to the trial court by counsel; was the only case cited in the briefs of both parties in the United States Court of Appeals, and was the only case cited by the United States Court of Appeals in its opinion affirming this case. It is the contention of plaintiff that this case is controlling and governs the interpretation of all federal statutes involved in this case, and that it was followed by both the District Court and the Circuit Court of Appeals.

**CONDITION OF THE LOCOMOTIVE BOILER.**

(A) The locomotive boiler of defendant which exploded in this case was being operated in violation of the law in four different respects, seven broken bolts being found in the crown sheet of the boiler (Record, pp. 18, 19 and 39).

(B) The crown sheet above the fire-box was leaking at the front and side (Record, p. 32.)

(C). Plaintiff's decedent asked to give up this locomotive engine several miles ahead of where the explosion occurred, stating to the dispatcher that he was afraid of it, but was ordered to proceed with this locomotive. (Record, p. 36.)

(D) The engine was not equipped with a fusible plug, thereby rendering it unnecessarily dangerous to plaintiff's decedent and other employees engaged in its operation.

Admittedly, this engine at the time of the accident was being operated in violation of the law in four different respects, as governed by Rule 25 of the Interstate Commerce Commission; first, in that seven staybolts were broken in the crown sheet; second, two of these broken staybolts were adjacent; third, three of these bolts on the right side of the crown sheet were within a radius of eighteen inches, three on the left side within a radius of eight inches. (Record, pp. 18, 19 and 39.)

Defendant's Master Mechanic stated at the trial that if he had known of this condition of broken staybolts he would not have allowed the locomotive boiler to be used on that run, and, further, that an inspection of the locomotive boiler prior to its run on the day of the accident would have disclosed the broken condi-

tion of these bolts. (Record, pp. 18 and 19.) That this condition of broken staybolts described as above weakened the boiler of this locomotive is shown by the testimony of plaintiff's witness, Boyden. (Record, p. 25.)

Judge Donahue in his opinion, after deciding that this matter was one for the jury, stated as follows:

"Wholly apart from these broken staybolts there is sufficient evidence in this record as to the defective condition of this engine in other respects, to sustain the verdict of the jury."

Defendant introduced expert testimony to the effect that the condition of these broken staybolts did not *weaken the boiler* or contribute to the explosion. This left the question one of fact to be submitted to the jury, which was done by the trial court. The question of weight of the evidence cannot properly be raised in this Court under motion for writ of certiorari.

The boiler of this locomotive at Foster's Tower, several miles ahead of the point where the boiler exploded, was found to be leaking at the front and the sides. (Record, p. 32,—plaintiff's witness, Bursec.) This is not denied by any witness for defendant.

At this point it is interesting to note the view which Judge Donahue of the United States Circuit Court of Appeals took of this evidence as noted in his opinion:

"It is claimed on behalf of the plaintiff in error that the explosion of this engine was caused by low water. *There is evidence in this record tending to prove that the boiler was in a leaking condition; that 'it was leaking up around the front and the side—the fire was dead and that when the door of the fire box was open the steam came out with a gush.'*

There is also evidence tending to prove that the engine took water at Foster's Tower about three

miles from the place where it exploded; that water was supplied from the tank to the boiler by two injectors and that at Foster's Tower both of these injectors were working. *If it were conceded that low water caused this explosion, the natural inference from this evidence would be that the engine was in such a defective and leaky condition that water could not be supplied fast enough by these two injectors to keep the crown sheet covered, although it appears from the testimony of the railroad company's master mechanic that with one injector working, the water would be kept above the crown sheet in the normal operation of the locomotive. The evidence also tends to prove the defendant was fully advised of the defective condition of this engine. When the train was at Moundsville, Groeger, the engineer, notified the defendant's train dispatcher that he was afraid of this engine and asked to be relieved of it, but the dispatcher ordered him to continue its use."*

Also in this connection the record shows that both injectors were working and supplying water to this boiler at Foster's Tower just shortly before the explosion, which is not denied in the record, although defendant continually claims that the explosion of this boiler was due to low water by reason of the negligence of the engineer.

Further, the opinion of Judge Donahue is quoted on the question as to any negligent operation by the engineer.

*"The presumption obtains that Groeger was exercising due care for his own safety. This presumption is strengthened by the evidence that he knew the engine was in such a defective condition that he was afraid of it and asked to be relieved from using it. There is no direct evidence in this record that he was negligent in any respect. Nor does the infer-*

*ence that he was negligent necessarily follow from the facts admitted or proven in this case. It was, therefore, a question for the jury to determine whether this explosion was caused by the manner in which it was operated or by its defective condition in one or more of the particulars in which the evidence tends to show it was defective."*

Plaintiff's decedent at Moundsville, some distance ahead of the explosion of the locomotive, asked defendant's dispatcher to be allowed to give up the engine at that point, asserting that he was afraid of it, but by defendant's dispatcher was ordered to continue with this engine. (Record, p. 36.) This testimony was developed by the cross-examination by defendant of plaintiff's witness and was taken by deposition some months before the trial of the case in the District Court, yet no contradiction of this testimony was offered by the defendant.

The use of fusible plugs in the boiler of a locomotive has been well known for a matter of many years, and they are an absolute prevention of the explosion of the locomotive boiler through overheating of the crown sheet or low water. (Record, pp. 23 and 26.)

Plaintiff's witness, Boyden, actively in charge of many engines for a number of years, with a great amount of practical experience with locomotives equipped with fusible plugs, testified as follows: (Record, p. 23)

"In railroad talk, a fusible plug is known as a soft plug. It is put into the highest point of the crown sheet, that is, the top of the inside of the fire-box. There is a soft metal applied to this brass plug so that if the water gets low this metal will melt. It is used as an alarm or a safety device to the engineer to know that his water is low in his

boiler. When the fusible plug operates, it relieves the pressure between the fire-box sheet and the outside wrapper sheet, so that a boiler cannot blow up.

I saw those fusible plugs in operation, directly, seven years that I was master mechanic. I used them on 178 engines on the Erie Railroad, during the period from 1912 to 1919. During that time I never had a boiler to blow up, due to the safety plug. We have had plugs give out on the railroad due to poor workmanship in the applying of the soft metal in the plugs. I have never recalled of an engineer or fireman being injured due to this. I have heard there was a case, but I have never seen it."

Defendant's claim against the use of the fusible plug was that scale would accumulate over it in the ordinary operation of the boiler and that this scale prevented the functioning of the plug, and that at times the plug melted out and allowed an escape of steam pressure from the boiler, which unfitted the engine for service for hours thereafter. Against this claim Boyden testified that the formation of scale on fusible plugs could be prevented as follows (Record, p. 26):

"On the railroad I was on, to prevent the formation of scale on the fusible plugs used in the locomotives, we filled these plugs with a soft metal and then made them in a crown shape, put them in a lathe and crowned them so that everything would slide, the scale would slide off from them. That prevented the formation of scale within the boiler on that plug."

Defendant's Master Mechanic, McGann, admitted this contention of plaintiff. (Record, p. 23.)

"Drawing that soft metal to a point would tend to prevent the formation of the deposit on that soft plug."



The Record embraces several pages of testimony from defendant's witness, W. C. Hedeman, who testified that a fusible plug was not practical, but he admitted that he had never seen a fusible plug in the crown sheet of a locomotive and had had no practical experience. (Record, p. 47.)

"I have not seen a fusible plug in use on the boiler of a locomotive engine."

Admittedly, in the practical operation of an engine, the pipes conducting water from the boiler to the sight glass feed and the gauge cocks may become obstructed by scale and thus render both the sight glass feed and the gauge cocks inoperative. This makes the need of the fusible plug in the boiler of a locomotive apparent. Under Section 2 of the Boiler Inspection Act any unnecessarily dangerous condition in a locomotive boiler is a violation of the Act, and the duty to prevent unnecessary dangers is absolute under that Act.

Defendant's expert witness, Karnell, (Record, p. 42) testified as follows regarding fusible plugs:

"In actual operation, a fusible plug placed at that point on the crown sheet, projecting above the crown sheet, as soon as the water got down to the fusible plug and laid bare the top of that fusible plug, the soft metal in that plug would melt and allow the escape of all pressure from that boiler, and in that way would prevent any burning or overheating of that crown sheet."

In this connection the opinion of Judge Donahue of the United States Circuit Court of Appeals is as follows:

"There is, however, substantial evidence in this regard tending to prove that fusible plugs are extensively used; that they may be rounded at the top,

so that the scale will not accumulate thereon; that they are generally recognized as effective and reliable means for preventing boiler explosions from low water and that if this engine had been equipped with a fusible plug this explosion would not have occurred, regardless of the other claimed defects. Upon this state of the proof, it was the duty of the court to submit this issue to the jury. This court has no authority to consider or determine the question of the weight of the evidence."

Admittedly, the Interstate Commerce Commission has made no definite rule either requiring or disapproving the use of fusible plugs in locomotive boilers. Rule 14 of the Interstate Commerce Commission, with reference to fusible plugs, provides as follows:

"If boilers are equipped with fusible plugs they shall be removed and cleaned of scale at least once every month. Their removal must be noted on the report of inspection."

The case of *Donaldson vs. Great Northern Railway Company*, 89 Wash. 161 (affirmed 246 U. S. 121), deals with the explosion of a locomotive boiler. The State Court held as follows on the question of fusible plug, which was raised in this case: That it was for the jury to say whether from the evidence the use of fusible plugs was a means of preventing the explosion of the boiler. (89 Wash. 165.)

The second paragraph of the syllabus in this case provides as follows:

"In an action for the death of an engineer through the explosion of a locomotive boiler it is for the jury to determine whether the railroad company was guilty of negligence in converting a coal burning locomotive into an oil burner without changing buttonhead bolts or using fusible plugs and as to the presence or absence of scale on the

crown sheet, when there was evidence that button-head bolts had a tendency to become overheated by an oil flame and taper heads were used on oil burners and that fusible plugs were a means of preventing explosions."

This case was affirmed by the Supreme Court, 246 U. S. 121. The case arose and was tried under the Boiler Inspection Act without the benefit of the Amendment of 1915 heretofore quoted, under which this case arose. In the *Donaldson* case claim was made of defective staybolts heads in the boiler, which it was claimed became overheated, allowing the explosion of the boiler. That type of construction in the *Donaldson* case was not prohibited in any way by the Boiler Inspection Act, and certainly had not been disapproved by the Federal Inspectors, the inference being that that type of construction was approved, and it was claimed by the defendant that because that type of construction was approved, or at least had not been disapproved by the Federal Inspector, was conclusive evidence of no negligence in its use. On this question, Judge Day in his opinion says:

"We find nothing in the Boiler Inspection Act to warrant the conclusion that there is no liability for an unsafe locomotive, in view of the provisions of section 2 of the act, because some particular feature of construction, which has been found unsafe, has not been disapproved by the federal boiler inspector."

In other words, plaintiff herein insists that the ideas of the Federal Inspectors are not conclusive or binding and not a defense in an action where evidence is introduced that the boiler was unsafe in the service to which it was put.

In the *Donaldson* case, failure to install a fusible plug in the locomotive was charged.

**CONCLUSION.**

Plaintiff therefore submits that the question of the interpretation of federal statutes involved in this case has been fully decided by this Court in the case of *Great Northern Railway Company vs. Donaldson*, 246 U. S. 121, and that its ruling was followed by the trial court and the Circuit Court of Appeals in this case, and that, therefore, the petition and motion for writ of certiorari should be denied.

Respectfully submitted,

FRANK M. COBB AND

E. C. CHAPMAN,

*Attorneys for Respondent.*



---

In the Supreme Court of the United States

---

THE BALTIMORE AND OHIO RAILROAD COMPANY,  
*Petitioner.*

vs.

FREDA GEORGE, ADMINISTRATRIX OF THE ESTATE OF  
JOHN C. GEORGE, DECEASED,  
*Respondent.*

---

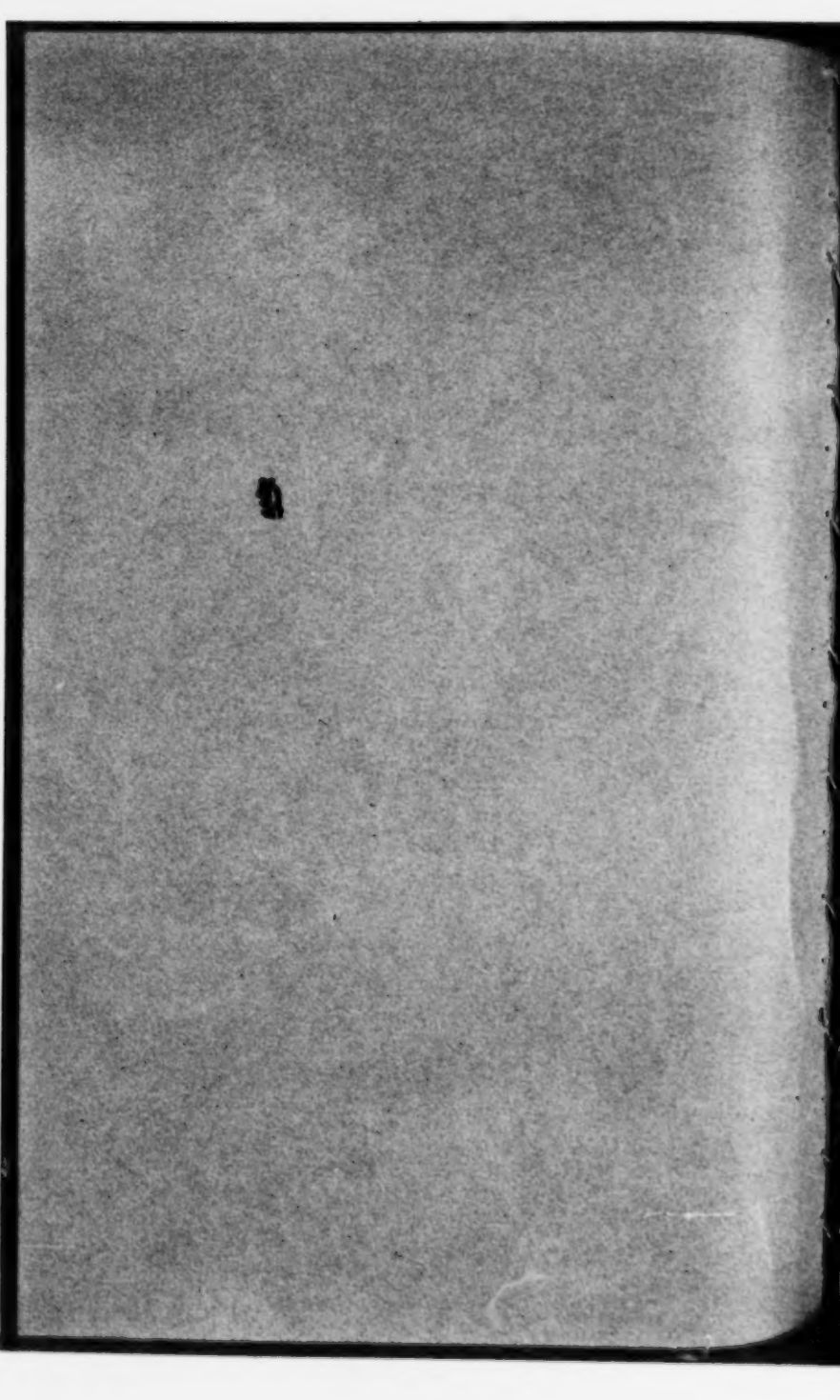
BRIEF ON BEHALF OF FREDA GEORGE,  
ADMINISTRATRIX RESPONDENT.

---

R. C. CHAPMAN,  
*Attorney for Respondent.*

---

1322



## INDEX.

---

Statement of Facts .....	1
The Locomotive Boiler Involved in This Accident was being Operated in Violation of the Law and in an Unsafe and Unnecessarily Dangerous Condition in Four Different Respects, as Dis- closed by the Record .....	2
The Statutes Involved .....	13
Conclusion .....	42

### Cases and Texts Cited.

<i>Blair vs. Western Cedar Company</i> , 75 Oreg. 276....	23
<i>Bowersock vs. Smith, Administratrix</i> , 243 U. S. 29	19
<i>Caldwell vs. Steamship Company</i> , 47 N. Y. 282....	21
<i>Davidson vs. Flower City Ornamental Iron Works</i> , 107 Minn. 17 .....	23
<i>Delk vs. Railroad Company</i> , 220 U. S. 580.....	17
<i>Director General of Railroads vs. Viscos Company</i> , 254 U. S. 498 .....	24
<i>Forrest vs. Roper Furniture Company</i> , 267 Ill. 331	23
<i>Great Northern Railway Company vs. Wiles</i> , 240 U. S. 444 .....	41
<i>Jeffersonville Mfg. Company vs. Holden</i> , 180 Indi- ana 301 .....	23
<i>Johnson vs. Steam Gauge Company</i> , 40 N. E. 773..	22
<i>Miller vs. Strahl</i> , 239 U. S. 426.....	18
<i>Mondou vs. various Railroad Companies</i> , 223 U. S. 1	17
<i>O'Connor vs. Armour Packing Company</i> , 158 Fed. 241 .....	22



<i>Railroad Company vs. Gotschall, Admr.,</i>	24 U. S.	
66 .....		17, 34
<i>Railroad Company vs. Layton,</i>	243 U. S. 617.....	17, 34
<i>Railroad Company vs. Otos,</i>	239 U. S. 349.....	17, 34
<i>Railroad Company vs. United States,</i>	220 U. S. 559	24
<i>Railway Company vs. Donaldson,</i>	246 U. S. 121, No.	
172.....		17, 24, 25, 27, 33, 34
<i>Railway Company vs. Rigsby,</i>	241 U. S. 33.....	17, 34
<i>Shanks vs. Railroad Company,</i>	239 U. S. 556.....	17
<i>Southern Railway Company vs. United States,</i>	222	
U. S. 20 .....		17
<i>Sprinkler Company vs. Fender,</i>	108 Ohio State, 139	23
<i>Streeter vs. Western Wheel Scraper Co.,</i>	254 Ill. 244	23
<i>Swarthout vs. New Jersey Steamship Company,</i>	48	
N. Y. 209 .....		21
<i>United States vs. Cohen Grocery Company,</i>	255 U.	
S. 81 .....		23
<i>Wick vs. Gunn,</i>	66 Okla. 316 .....	23

# In the Supreme Court of the United States

---

THE BALTIMORE AND OHIO RAILROAD COMPANY,  
*Petitioner,*

VS.

FREDA GROEGER, ADMINISTRATRIX OF THE ESTATE OF  
JOHN C. GROEGER, DECEASED,  
*Respondent.*

---

## **BRIEF ON BEHALF OF FREDA GROEGER, ADMINISTRATRIX, RESPONDENT.**

---

### **STATEMENT OF FACTS.**

The parties are designated herein as they stood in the trial court, to wit, *Freda Groeger, Administratrix, Plaintiff, vs. The Baltimore and Ohio Railroad Company, Defendant.*

The action was brought under benefit of the Federal Employers' Liability Act and the Locomotive Boiler Inspection Act by Freda Groeger, Administratrix of the Estate of John C. Groeger, to recover damages for the alleged wrongful death of said Groeger, who was employed by the Company as a locomotive engineer.

Early on the morning of September 3, 1920, Groeger left Holloway, Ohio, as engineer of locomotive No. 2541 of the defendant, with a string of cars for Brooklyn Junction, West Virginia, crossing the Ohio River near Wheeling, and continuing through Moundsville, Chestnut Hill, Foster's Tower, and to a point near Proctor, West

Virginia. At a point near Proctor, West Virginia, some three miles beyond Foster's Tower, the boiler of the locomotive exploded with great violence, causing the death of all employees on the locomotive and hurling the superstructure of the engine hundreds of feet away from the point of the explosion. Admittedly, both parties to this action were engaged in interstate commerce at the time it occurred, and the case is governed by the Federal Employers' Liability Act and the Locomotive Boiler Inspection Act and their amendments.

The locomotive boiler when last seen prior to the disaster was being supplied with water by both injectors on the engine, which constituted the only manner of supplying water to the boiler. This testimony is not disputed by defendant.

**THE LOCOMOTIVE BOILER INVOLVED IN THIS ACCIDENT WAS BEING OPERATED IN VIOLATION OF THE LAW AND IN AN UNSAFE AND UNNECESSARILY DANGEROUS CONDITION IN FOUR DIFFERENT RESPECTS, AS DISCLOSED BY THE RECORD.**

(A) The locomotive was being operated in violation of Rule 25, approved by the Interstate Commerce Commission, in four different respects, in that seven broken bolts in the crown sheet were broken before the locomotive started on the trip. (Record, pages 13, 14 and 29.)

(B) The crown sheet of the locomotive was leaking up around the front and the side, at which points the fire was dead. (Record, p. 24.)

(C) Plaintiff's decedent asked to give up this locomotive several miles ahead of the point where the explosion occurred, stating to the dispatcher of defendant that

he was afraid of it, but by the dispatcher was ordered to proceed with the locomotive. (Record, p. 27.)

(D) The locomotive boiler was not equipped with a fusible plug, which rendered it unnecessarily dangerous to the employees engaged in its operation.

(A) Rule No. 25, approved by the Interstate Commerce Commission, provided as follows:

“25. *Broken staybolts*—No boiler shall be allowed to remain in service when there are two adjacent staybolts broken or plugged in any part of the firebox or combustion chamber, nor when three or more are broken or plugged in a circle 4 feet in diameter, nor when five or more are broken or plugged in the entire boiler.”

Admittedly, Rule 25 under this law was violated in four different respects by the defendant in the operation of this boiler on the day that it exploded, and defendant's master mechanic frankly admitted at the trial that if he had known of the condition of the boiler he would not have allowed it to be operated on that run the day the explosion occurred. (See testimony of Master Mechanic McGann, Record, pp. 13, 14 and 29.)

“I was Master Mechanic on the day of the accident to Mr. John Groeger on engine 2541. When I got notice of the accident I was in front of the Y. M. C. A. Building at Benwood. I went to the scene of the accident immediately after receiving notice and made an inspection of the boiler and engine. I was notified about twelve-ten or twelve-fifteen p. m., and arrived at the scene of the accident, as near as I can judge, about 2:40 p. m. I made an inspection of the fire-box, but we are prevented from making further inspection, according to the Interstate Commerce Rules, so we made observations as to the firebox and condition of the boiler.

We found six intermediate stays and one stay bolt at the forward part of the crown sheet, broken. There were two adjacent broken bolts on the left side, if I remember correctly. I haven't my records with me. There were three broken stays on the left side and three on the right side, intermediate stays, and the three on the right side were in a radius of, I would say, sixteen inches, and the two adjacent, on the left side, were within eight inches. The third one was within twelve inches of the other two—one was skipped and another bolt broken. The broken crown bolt was in the fifth row from the flue sheet. None of those broken bolts had telltale holes in them." (Record, p. 13.)

"Q. My question was, would you have allowed this engine to make that run from Holloway to Brooklyn Junction on that day if you had known those bolts were broken within that boiler?

Mr. Kinder: Same objection.

The Court: Overruled.

Mr. Kinder: Exception.

A. No, sir." (Record, p. 14.)

"As to the broken stay bolts which I found on my investigation of this boiler, an inspection of that boiler prior to the explosion would have disclosed the broken condition of those stay bolts.

If I had known that on one side of that firebox three of those broken intermediate or radial bolts were within a circle of eight inches, as I testified, I would not have allowed that boiler and locomotive in service that day. If I had known that two of those bolts broken were adjacent, I would not have allowed that boiler in the service to which it was put that day." (Record, p. 29.)

Admittedly, seven bolts were broken throughout the boiler of this engine, which, under the Boiler Inspection Act, made it unlawful to be operated. Two of these

broken bolts were adjacent, which fact alone made it unlawful to operate the boiler. Three of these bolts were on the right side of the boiler within a radius of eighteen inches,—another violation,—and there were on the left side of the boiler in a radius of eight inches,—another violation,—making four conditions in the boiler each one of which was sufficient to prohibit under the law the operation of the boiler on the day of the accident. That all of these conditions existed prior to the day the boiler was operated and would have been disclosed by an inspection is borne out by the testimony in the Record, pp. 13, 14 and 29. That the broken bolts described, which existed prior to the explosion, weakened this boiler, is shown by the testimony of Boyden (Record, p. 18), who had had years of practical experience with locomotive boilers and with fusible plugs.

“Assuming that there were three broken intermediate bolts in an eight-inch circle on one side, and three on the other in an eighteen-inch circle, two of them adjacent, and one crown bolt was broken,—it is bound to weaken the boiler at that point. The fact two of those broken bolts were adjacent, distributes the load over to the next bolts, which have to carry the loads of the broken ones.”

Defendant admitted all of these violations, but offered evidence to the effect that such broken bolts were not a contributing cause to the explosion. Plaintiff submits from this Record that this left the question one of fact to be submitted to the jury, which the trial court did in very clear and concise language, strongly emphasizing to the jury that this condition of broken bolts must be found to be the sole cause, or one of the causes, but for the existence of which the explosion would not have taken place. (See Record, p. 59.)

"Even if it should be proved that that requirement of the law was violated, the plaintiff would not be entitled to recover by reason of such violation unless you should further find from a preponderance of the evidence that this specific violation, these specific defects, was either the sole or one of the causes but for the existence of which the explosion would not have taken place. If the existence of these broken stay-bolts had nothing to do with causing the explosion, then you should disregard their existence because, as I say to you, the negligent or wrongful conduct which you may find by a preponderance of the evidence the defendant is guilty of, must have been either the sole or one of the proximate causes of the explosion and of the resultant death of plaintiff's decedent."

The existence of the broken bolts was explained in the testimony of plaintiff's witness, Boyden, namely, that this could be caused by previous overheating of the crown sheet. (Record, p. 19.)

# "The overheating of a crown sheet has a tendency to draw or pull or strip threads of the bolts and crack them."

And this is not denied on behalf of defendant by any witness.

The Federal Boiler Inspection Act was enacted for the safety of employees and should be liberally construed. Its scope has been enlarged since its enactment, particularly by the Amendment of 1915 making the Act applicable to the entire locomotive, tender and all parts and appurtenances thereof. It has evidently been the purpose and intent of Congress to enlarge its application and scope of operation.

(B) Testimony of plaintiff's witness, Bursee. (Record, p. 24.)

"When I was on the engine both injectors were working. I heard them working. If they had not been working steam would not have been coming out of the bottom, or they would kick off. Both of these injectors were working.

While on the engine I saw the firebox door open and I noticed it was leaking up around the front, and the side—the fire was dead. You could hear the sizzling of the water hitting on the fire. When I opened the door steam came out of the firebox. With the door open there was a gush came."

This testimony is that of the last witness to have seen the condition of this locomotive boiler prior to the accident who was not killed in the explosion. He was an employee of defendant on a train bound in the opposite direction, which met the decedent's train at Foster's Tower. His testimony was taken<sup>1</sup> by deposition some months prior to the trial of this case, yet at the trial defendant offered no evidence in any way disputing this testimony and accounted in no way for the absence of the dispatcher, of whom Groeger had asked permission to give up his engine.

(C) A link-hanger on this engine was broken prior to reaching Moundsville, and difficulty encountered in getting up steam. The record shows that the engineer asked the dispatcher to allow him to give up this engine, stating to the dispatcher that he was afraid of it, but the dispatcher ordered him to continue with it. (Record, p. 27.)

(D) The record shows the fusible plug, also known as the fusible safety plug, was a device going into the highest part of the crown sheet, which would prevent the explosion of the locomotive boiler due to the overheating of the crown sheet. It also shows that the de-



vice was practical, had been in use for a good many years. (Record, pp. 17 and 18.) The use of these plugs in the locomotive engine would prevent the explosion of the boiler from overheating of the crown sheet. Some of this testimony is quoted herewith. (Record, p. 32, defendant's witness, Karnell.)

"In actual operation, a fusible plug placed at that point on the crown sheet, projecting above the crown sheet, as soon as the water got down to the fusible plug and laid bare the top of that fusible plug, the soft metal in that plug would melt and allow the escape of all pressure from that boiler, and in that way would prevent any burning or overheating of that crown sheet."

Plaintiff's witness, Boyden, actively in charge of many engines for a number of years, with a great amount of practical experience with locomotives equipped with fusible plugs, testified as follows (Record, p. 17):

"In railroad talk, a fusible plug is known as a soft plug. It is put into the highest point of the crown sheet, that is, the top of the inside of the fire-box. There is a soft metal applied to this brass plug so that if the water gets low this metal will melt. It is used as an alarm or a safety device to the engineer to know that his water is low in his boiler. When the fusible plug operates, it relieves the pressure between the fire-box sheet and the outside wrapper sheet, so that a boiler cannot blow up.

I saw those fusible plugs in operation, directly, seven years that I was master mechanic. I used them on 178 engines on the Erie Railroad, during the period from 1912 to 1919. During that time I never had a boiler blow up, due to the safety plug. We have had plugs give out on the railroad due to poor workmanship in the applying of the soft metal in the plugs. I have never recalled of an engineer

or fireman being injured due to this. I have heard there was a case, but I have never seen it."

Defendant's claim against the use of the fusible plug was that scale would accumulate over it in the ordinary operation of the boiler and that this scale prevented the functioning of the plug, and that at times the plug melted out and allowed an escape of steam pressure from the boiler, which unfitted the engine for service for hours thereafter. Against this claim Boyden testified that the formation of scale on fusible plugs could be prevented as follows (Record, p. 19):

"On the railroad I was on, to prevent the formation of scale on the fusible plugs used in the locomotives, we filled these plugs with a soft metal and then made them in a crown shape, put them in a lathe and crowned them so that everything would slide, the scale would slide off from them. That prevented the formation of scale within the boiler on that plug."

Defendant's Master Mechanic, McGann, admitted this contention of plaintiff. (Record, p. 16.)

"Drawing that soft metal to a point would tend to prevent the formation of the deposit on that soft plug."

The record embraces several pages of testimony from defendant's witness. W. C. Hedeman, who testified that a fusible plug was not practical, but he admitted that he had never seen a fusible plug in the crown sheet of a locomotive and had had no practical experience. (Record, p. 36.)

"I have not seen a fusible plug in use on the boiler of a locomotive engine." (Record, p. 36.)

This witness admits that, "theoretically," the broken bolts found in the boiler would reduce the strength of

the boiler for internal resistance, but maintains that this condition of reduced resistance did not contribute to the boiler explosion. (Record, pp. 37 and 38.)

“Theoretically, the broken crown bolt which I have marked as being broken, would reduce the strength of that boiler for internal resistance. As this particular point where these bolts are broken is the strongest part of this firebox, crown or stay sheets, for this reason: that it is on what is known as the radius. A man doesn't have to be a mechanic to know that a sheet bent like this will stand more pressure than a flat sheet. That is why I say theoretically only it reduces the strength because it is in the strongest part of the firebox.” (Record, p. 38.)

The use of a fusible plug is contemplated in some measure at least by the Interstate Commerce Commission by reason of its rule or Order No. 14, which provides as follows:

“14. *Fusible plugs.*—If boilers are equipped with fusible plugs they shall be removed and cleaned of scale at least once every month. Their removal must be noted on the report of inspection.”

Defendant would seem to claim that the failure to install or use a fusible plug in a locomotive in interstate commerce is not a violation of the Boiler Inspection Act for the reason that it is not specifically required by the Interstate Commerce Commission through its authority under the Act, and that the use of an engine without it is approved, or at least not disapproved, by the Commission.

Plaintiff submits from the foregoing testimony that the question of fusible plug in this case becomes one for the jury under the instructions of the court, it being a question of fact as to whether or not the danger of the

explosion of a boiler solely due or contributed to by an overheated crown sheet can be absolutely prevented by the use of a fusible plug. In other words, the record would seem to clearly show that the risk of boiler explosions through overheated crown sheets in the practical operation of a locomotive is absolutely *unnecessary*, for the reason that a fusible plug will absolutely prevent this, as has heretofore been shown by the testimony of practical men called both by plaintiff and defendant. The record clearly shows the further need for the fusible plug in the locomotive, by reason of the fact that the gauge cocks and sight glass feed may become obstructed by the formation of scale therein in the practical operation of the boiler, and the height of the water in the boiler would not be disclosed by these appliances.

Quoting from the testimony of defendant's Master Mechanic, McGann (Record, p. 14):

"In the operation of the boiler there is a deposit within the boiler of scale or sediment from the water. That obstructs, at times, both the gauge cocks and the water glass on the boiler. I might add that they are required to remove them monthly and clean the same. If allowed to continue they will accumulate with dirt and scale and obstruct the proper reading. In my experience as Master Mechanic I have seen that condition arise where those things became obstructed."

Joseph A. Boyden, for many years Master Mechanic of the Erie Railroad, in charge of a number of locomotives, testified as follows (Record, p. 18):

"Gauge cocks can become obstructed by scale formation in the boilers. If you wash your boiler often enough that can be prevented. I wouldn't say the scale forms in the gauge cock pipes the same as the rest of the boiler, because in opening your gauge

cocks the pressure is so great you constantly blow them out. When they would become obstructed you couldn't use the gauge cocks, nothing would come out; it would be simply plugging it up."

That the sight glass feed on this locomotive was very unsteady, was continually fluctuating a short time prior to the explosion, was shown by testimony of defendant's conductor, Bethel, (Record, p. 11) and by witness, Bursee, (Record, p. 24):

"On my trip in that engine I observed the water glass gauge. The water boiled, or something—went up in it and then down. I don't know how far up the water went in the gauge. It went down out of sight. I just saw it do that the one time between Chestnut Hill and Foster. I don't think I rode the engine from Foster Tower up to Wells Pit. After I saw that sight glass going up and down, I don't remember that I observed it again before leaving the engine." (Record, p. 11.)

"The water was going up and down in the water glass, not fast and not slow. When it went down it would disappear, about to the bottom. It would not disappear; just about to the bottom." (Record, p. 24.)

That this could be due to impurities in the water is shown by the testimony of Boyden (Record, p. 18):

"The falling and rising of water in the sight glass feed tube to practically the extent of the water glass is due to foaming in the boiler, which may be due from alkali or soda that would get into your boiler. A low stage of water in the boiler would not cause it to rise and fall. It would have to be a matter of foaming from one of the causes I mentioned or something else.

When the water in the boiler is foaming, if the engineer happens to be trying his gauge cocks, when

the water is dropping it will show him no water; if he happens to be trying the gauge cocks when the water is rising it will show he has got water. It affects the apparent height as indicated in the water glass; it raises and lowers it." (Record, p. 18.)

### THE STATUTES INVOLVED.

These statutes are constitutional and enforceable and sufficiently defined, and their construction by the trial court has been approved by this Court. Under this heading the first two assignments of error, (a) and (b), of the petitioner are discussed.

Admittedly the federal statutes involved herein are what is known as the Federal Employers' Liability Act, the various Safety Appliance Acts, including the Locomotive Boiler Inspection Act. All of these statutes are remedial statutes enacted for the safety of employees and the travelling public to supplant the old rules of the common law. By reason of the great development of steam and electric power greatly facilitating the manufacture of various commodities and the transportation of various commodities, dangers incident to employees in these lines were greatly increased and remedial statutes were enacted by practically all of the states as well as by the United States. Pertinent portions of the Federal Employers' Liability Act are quoted herewith as follows:

*"The Federal Employers' Liability Act of 1908 as Amended. An Act Relating to the liability of common carriers by railroad to their employes in certain cases.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.*

Section 1. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employe, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

\* \* \* \* \*

Sec. 4. In any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employes, such employe shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death of such employe."

The Federal Safety Appliance Act, relating to the couplers, brakes, etc., is not quoted, being not involved in this discussion.

*"The Federal Boiler Inspection Act.*

An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto.

Section 1. The provisions of this act shall apply to any common carrier or carriers, their officers, agents, and employes, engaged in the transportation of passengers or property by railroad in the District of Columbia, or in any Territory of the United States, or from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States. The term 'railroad' as used in this act shall include all the roads in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and the term 'employes' as used in this act shall be held to mean persons actually engaged in or connected with the movement of any train.

Sec. 2. From and after the first day of July, nineteen hundred and eleven, *it shall be unlawful* for any common carrier, its officers or agents, subject to this act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereof are in *proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb*, and all boilers shall be inspected from time to time in accordance with the provisions of this act, and be able to withstand



such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

*"Amendment of 1915 to Federal Boiler Inspection Act.*

Sec. 1. That section two of the Act entitled 'An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto,' approved February seven-teenth, nineteen hundred and eleven, shall apply to and include *the entire locomotive and tender and all parts and appurtenances thereof.*"

*"It is ordered, That said rules and instructions for the inspection and testing of locomotive boilers, and their appurtenances, as follows, be, and the same are hereby, approved, and from and after the 1st day of July, 1911, shall be observed by each and every common carrier subject to the provisions of the act of Congress aforesaid as the minimum requirements: Provided, That nothing herein contained shall be construed as prohibiting any carrier from enforcing additional rules and instructions not inconsistent with the foregoing, tending to a greater degree of precaution against accidents."*

**"RESPONSIBILITY FOR THE GENERAL CONSTRUCTION  
AND SAFE WORKING PRESSURE.**

1. The railroad company will be held responsible for the general design and construction of the locomotive boilers under its control. \* \* \* "

**"INSPECTION OF INTERIOR OF BOILER.**

\* \* \* \* \*

14. *Fusible plugs.*—If boilers are equipped with fusible plugs they shall be removed and cleaned of scale at least once every month. Their removal must be noted on the report of inspection."

The Federal Employers' Liability Act of 1908 and its amendments have been declared constitutional and valid by this Court in 223 U. S., p. 1, *Mondou vs. various Railroad Companies*. The constitutionality of the Safety Appliance Acts with the exception of the Locomotive Boiler Inspection Act has been declared by this Court in the case of *Southern Railway Company vs. United States*, 222 U. S. p. 20. Remedial statutes similar to these federal statutes have been liberally construed by courts of all jurisdictions, as have the federal statutes involved here by this Court. In the interpretation and construction of these statutes three points seem to have been considered: First, the old law, the mischief and the remedy, in the light of the common law at the making of the act; second, what was the mischief which the common law permitted; third, the remedy the Legislature has provided to cure the mischief. The duty of the courts in the construction of these statutes is to suppress the mischief and advance the remedy. Many of these statutes provide for inspectors to promote the safety of employees for whom they were enacted. This Court has liberally construed remedial statutes in the following cases:

- 220 U. S. 580, *Delk vs. Railroad Company*;
- 239 U. S. 349, *Railroad Company vs. Otos*;
- 239 U. S. 556, *Shanks vs. Railroad Company*;
- 241 U. S. 33, *Railway Company vs. Rigsby*;
- 243 U. S. 617, *Railroad Company vs. Layton*;
- 24 U. S. 66, *Railroad Company vs. Gotschall, Admr.*;
- 246 U. S. 121, *Railway Company vs. Donaldson*.

Similar remedial statutes in the various States of the Union, being entitled "Acts to Promote the Safety

and Health of Employees," and seeming to provide a general rule of conduct covering "safe" place to work, "reasonable" guarding of machinery and "practical" guarding of dangerous machinery, have been reviewed by this Court. One of these cases is that of *Miller vs. Strahl*, 239 U. S., p. 426. In this case a Nebraska statute known as Section 3104 of the Revised Statutes of the State, 1913, provided as follows:

✓ "In hotels or lodging houses containing more than fifty rooms, and being four or more stories high, the proprietor or lessee of each hotel or lodging house shall employ and keep at least one competent watchman, whose duty it shall be to keep watch and guard in such hotel or lodging house against fire and to give warning in case a fire should break out. Such watchman shall be on duty between the hours of 9 o'clock P. M. and 6 o'clock A. M., and in case of fire he shall instantly awaken each guest and all other persons therein, and inform them of such fire. A large alarm bell or gong shall be placed on each floor or story, to be used to alarm the inmates of such hotel or lodging house in case of fire therein. It shall be the duty of every proprietor, or keeper of such hotel or lodging house, in case of fire therein to give notice of same to all guests and inmates thereof at once and to do all in their power to save such guests and inmates."

This statute was reviewed by this Court and attacked on the grounds that it contravenes the Constitution of the State of Nebraska and also the Constitution of the United States. The question as to uncertainty as to the rule of conduct, together with the indefinite rule laid down by the statute, was seriously attacked. This Court sustained the statute, and the opinion of Justice McKenna in part is quoted herewith:

✓ "Plaintiff in error contends further that the statute 'is lacking in due process of law' because 'it fails to prescribe any fixed rule of conduct.' The argument is that the requirement 'to do all in one's power' fails to inform a man of ordinary intelligence what he must or must not do under given circumstances.

Rules of conduct must necessarily be expressed in general terms and depend for their application upon circumstances, and circumstances vary. It may be true, as counsel says, that 'men are differently constituted,' some being 'abject cowards, and few only are real heroes'; that the brains of some people work 'rapidly and normally in the face of danger while other people lose all control over their actions.' It is manifest that rules could not be prescribed to meet these varying qualities. Yet all must be brought to judgment. And what better test could be devised than the doing of 'all in one's power' as determined by the circumstances?

The case falls, therefore, under the rule of *Nash v. United States*, 229 U. S. 373, 57 L. ed. 1232, 33 Sup. Ct. Rep. 780, and not under the rule of *International Harvester Co. v. Kentucky*, 234 U. S. 216, 58 L. ed. 1284, 34 Sup. Ct. Rep. 853."

A remedial statute of the State of Kansas was also reviewed by this Court in the case of *Bowersock vs. Smith, Administratrix*, 243 U. S. 29. This statute is entitled and provides as follows:

"An Act Requiring Safeguards for the Protection of All Persons Employed or Laboring in Manufacturing Establishments, and Providing Civil Remedies for All Persons So Engaged, or Their Personal Representatives, in Cases Where any such Person May Be Killed or Injured While Employed or Laboring in Any Manufacturing Establishment Which Is Not Properly Provided with the Safeguards Required by This Act.

Sec. 4. All \* \* \* machinery of every description used in a manufacturing establishment shall, where practicable, be properly and safely guarded, for the purpose of preventing or avoiding the death of or injury to the persons employed or laboring in any such establishment; and it is hereby made the duty of all persons owning or operating manufacturing establishments to provide and keep the same furnished with safeguards as herein specified."

This act, where "practicable," required that all machinery be "properly and safely guarded."

The defense in this action offered testimony by a number of experts that they did not consider it "practicable" to safeguard this particular machinery. Part of the opinion of the Court is quoted as follows:

"That government may, in the exercise of its police power, provide for the protection of employees engaged in hazardous occupations by requiring that dangerous machinery be safeguarded, and by making the failure to do so an act of negligence upon which a cause of action may be based in case of injury resulting therefrom, is undoubted. And it is also not disputable that, consistently with due process, it may be provided that, in actions brought under such statute, the doctrines of contributory negligence, assumption of risk, and fellow servant shall not bar recovery, and that the burden of proof shall be upon the defendant to show a compliance with the act. (Citing various decisions)

While not directly disputing these propositions, and conceding that the Kansas statute contains them, and that it is not invalid for that reason, nevertheless it is insisted that the construction placed upon the statute by the court below causes it to be repugnant to the due process clause of the 14th Amendment. This contention is based alone upon the ruling made by the court below that, under

the statute, the deceased had a right to recover although he had contracted with the owner to provide the safeguards the failure to furnish which caused his death,—a result which, it is urged, makes the owner liable and allows a recovery by the employee because of his neglect of duty. We think the contention is without merit. It is clear that the statute, as interpreted by the court below,—a construction which is not challenged,—imposed a duty as to safeguards upon the owner which was absolute, and as to which he could not relieve himself by contract. This being true, the contention has nothing to rest upon, since, in the nature of things, the want of power to avoid the duty and liability which the statute imposed embraced all forms of contract, whether of employment or otherwise, by which the positive commands of the statute would be frustrated or rendered inefficacious.”

A federal act very similar to the Locomotive Boiler Inspection Act and relating to boilers of steamships is known as the Act of March 2, 1905, 1456, 33 Statutes, p. 1028. This Act provided for safe boilers and provided for federal inspectors and for the boilers being certified by the federal inspectors. A boiler used on a steamship, which had been certified as proper by a federal inspector, failed, resulting in injury to a passenger, and the court permitted proof of its unsafe condition, notwithstanding that it had been certified to as complying with the Act by a federal inspector. The question involved there a new type of brace for the boiler which was used by some steamship companies, but not by others. The question as to whether this boiler was safe under the Act without that brace was submitted to a jury and recovery allowed.

*Swarthout vs. New Jersey Steamship Company*,  
48 N. Y. 209;

*Caldwell vs. Steamship Company*, 47 N. Y. 282.

The courts in passing on the Act stated that the purpose of the Act, together with supplying federal inspectors, was to promote greater security and safety of passengers.

A New York statute required "suitable" and "proper" fire escapes, well fastened and secured, and of sufficient strength. This fire escape had been approved by the factory inspector, and injury resulted upon it. Proof of its unsafe condition was allowed in a civil action, and damages recovered.

*Johnson vs. Steam Gauge Company*, 40 N. E. 773.

X / The real question involved in cases arising under these statutes is the actual safety of the boilers. The approval or disapproval of them by the federal inspectors is not conclusive as to their condition, and the purpose of hiring inspectors is only to promote compliance with the law. In the case of *O'Connor vs. Armour Packing Company*, 158 Fed. 241, the Federal Meat Inspection Act was construed. In that case the Act provided for inspectors, as does the Boiler Inspection Act, and the federal inspector there actually passed a carcass of an animal as being within the Act, and subsequent to his inspection and approval of this carcass an employee became infected through working upon the carcass. Proof of the condition of the carcass, as being in violation of the Act, was allowed and recovery permitted by the court.

Statutes providing for the guarding of dangerous machinery where practicable, naturally raise questions of fact as to the difference of opinion as to what constitutes "practicability" under the situation involved. That this question under those circumstances is for the jury to consider under proper instructions from the

court, and is constitutional, would seem to be decided by this Court in the above cases.

That the rules and orders of the Interstate Commerce Commission under the Boiler Inspection Act do not contemplate all unsafe conditions arising in the operation of the locomotive boiler is evidenced by the provision at the close of their order of adoption, which authorized carriers to provide additional rules for safety and precaution against accidents. Rule No. 1 evidences that the Commission did not at any time seek to direct as to the construction and design of the locomotive boilers, but preferred to leave the responsibility for that on the carriers.

The Supreme Courts of the following States have given a like construction and interpretation to similar remedial statutes and requirements thereunder:

*Sprinkler Company vs. Fender*, 108 Ohio State, 139;

*Jeffersonville Mfg. Company vs. Holden*, 180 Indiana 301;

*Blair vs. Western Cedar Company*, 75 Oreg. 276;

*Forrest vs. Roper Furniture Company*, 267 Ill. 331;

*Streeter vs. Western Wheel Scraper Co.*, 254 Ill. 244;

*Davidson vs. Flower City Ornamental Iron Works*, 107 Minn. 17;

*Wick vs. Gunn*, 66 Okla. 316.

The case of *United States vs. Cohen Grocery Company*, 255 U. S. 81, is cited in the brief of petitioner in support of its claim that the Federal Locomotive Boiler Inspection Act is not constitutional. This case was a criminal prosecution for penalty and required a strict



rule of construction by the court. It is not in any way analagous to remedial statutes such as the Locomotive Boiler Inspection Act in an action for damages for its violation. The Locomotive Boiler Inspection Act is not a penal act, or at most it can be separated, the remedial part from the penal part, and the remedial part requires a liberal rule of construction. Action by the Government for penalty under the Boiler Inspection Act is a civil action, and a mere preponderance of the evidence is sufficient for the Government to prevail.

220 U. S. 559, *Railroad Company vs. United States*.

Similarly are other cases cited by petitioner in its brief, criminal prosecutions requiring a different rule of construction.

The case of *Director General of Railroads vs. Viscos Company*, 254 U. S., p. 498, arises under wholly different power of the Interstate Commerce Commission than is vested in it by the Locomotive Boiler Inspection Act. Under that Act a certain division of the Interstate Commerce Commission was given original and exclusive jurisdiction on questions of rates and tariffs, and the Act provided that rights under the Act must first be passed upon by the Commission before redress could be sought in the courts. In this case redress was sought in the courts before the matter was passed upon by the Commission.

The Federal Boiler Inspection Act has been construed by the courts of the State of Washington and that construction reviewed by this Court under its status prior to the Amendment of 1915, which greatly enlarged its application, in the case of *Railway Company vs. Donaldson*, 246 U. S. p. 121, No. 172, decided by this

Court in 1918. In that case, as in this case, the construction of the Act by the trial court was seriously criticised on the same grounds as upon the construction of the trial court in this case. In the *Donaldson* case the Court charged as follows:

“Instruction No. V.

The plaintiff alleges that the death of Vance H. Thoms was directly caused by the negligence of the defendant railroad company in that the locomotive boiler of the engine on which the explosion took place was negligently allowed to be defective in the following particulars:

1. That the button heads of the crown bolts were excessively large; and
2. That the boiler was not provided with safety fusible plugs; and
3. That scale was negligently allowed by the defendant to accumulate on the crown sheet of the said boiler.

If you find from the evidence that the defendant was negligent in any one or more of these particulars, and that said negligence was the direct cause of the death of Vance H. Thoms then the plaintiff is entitled to recover a verdict at your hands in such sum as you shall determine in accordance with these instructions, not exceeding in any case the sum of \$20,000.00, unless you shall find that Vance H. Thoms assumed the risk of the explosion as herein-after explained.”

“Instruction No. VI.

You are instructed that the law provides that it shall be unlawful for any common carrier, as was the defendant, engaged in interstate commerce, to use any locomotive engine propelled by steam power unless the boiler of the locomotive engine and appurtenances thereof are in proper condition and

safe to operate in the service to which the same is put, that the same may be employed in the active service of said carrier in moving traffic, without unnecessary peril to life and limb; and that no employe shall be deemed to have assumed any risk of death by reason of any locomotive engine operated in violation of said law, and that no employe injured or killed by reason of a locomotive engine operated in violation of said law shall be held to have been guilty of contributory negligence.

Therefore, if you shall believe from a fair preponderance of all the evidence in the case that the boiler of the locomotive engine No. 1902 or the appurtenances thereof were not in proper condition and safe to operate in the active service of the defendant in moving traffic without unnecessary peril to life or limb by reason of the negligence of the defendant in any one or more of the three respects alleged in the complaint, then and in that case Vance H. Thoms assumed no risk of death, and was guilty of no contributory negligence, and the affirmative defenses must fail.

However, if such boiler and appurtenances were in proper condition and safe for such use in moving traffic, but due to defendant's negligence were defective in one or more of the respects alleged in the complaint and Vance H. Thoms had actual knowledge of such defect or defects, or such defects were so plainly observable that in the reasonable exercise of his faculties he should have known of such and may be presumed to have known thereof and the dangers that surrounded him, then Vance H. Thoms assumed the risks of injury and the plaintiff cannot recover in this action.

So, also if such boiler and appurtenances were in proper condition and safe for such use in moving traffic but due to defendant's negligence were defective in one or more of the respects alleged, Vance H. Thoms would have been guilty of contributory

negligence if he failed to exercise such care and prudence as an ordinary *and* prudent and careful person engaged in like employment under like circumstances would usually and ordinarily exercise, with the legal effect and result set forth in the following instructions."

The judgment obtained in the *Donaldson* case under this charge was approved by the Supreme Court of the State of Washington and approved by this Court with the statement that it was more favorable to defendant than the law required. It is manifest from this charge that the issues were not clearly defined and concretely stated to the jury by the trial court nor the liability of the defendant as to the fusible plug qualified, as was the charge of the court in the present case, parts of which are quoted herewith:

"(1) Did the defendant permit or allow a dangerous, unsafe and insufficient condition to be and arise in and about the crown sheet of said boiler whereby it was weakened and became defective, unsafe and leaky; whether that was due to any or whatever cause, broken crown or stay-bolts or other causes, and if so, was the boiler explosion thereby caused in whole or in part. Plaintiff asserts that, and the defendant denies it. It will be for you to say under the evidence here, gentlemen, and the law as I state it to you, what the fact is in this respect.

(2) It being conceded that the defendant had failed to install and equip this locomotive engine with a fusible safety plug, it will be for you to say whether or not the standard of duty imposed by law upon the defendant, to see that any locomotive engine propelled by steam in use on its road in interstate commerce was in a proper condition and safe to operate in the service to which it was put, that the same might be employed in the active service in moving traffic without unnecessary peril to life or

limb, was violated by the failure to equip this engine with a fusible safety plug. Plaintiff asserts that it was a violation of the duty imposed by law upon the defendant not so to equip its engine; the defendant asserts the contrary, and that will be the issue to determine under the evidence as I shall state it to you, and if so, whether that was the proximate cause or one of the proximate causes of this injury. The defendant denies these charges of negligence; that places the burden of proof upon the plaintiff, and the plaintiff must sustain that burden by a preponderance of the evidence.

Now, what is the law? As I have stated, these issues are controlled by provisions of the Boiler Inspection Act and by certain provisions of the Federal Employers Liability Act. The Boiler Inspection Act, among other things, provides that it shall be unlawful for any common carrier to use any locomotive engine propelled by steam power, moving in interstate or foreign traffic, unless the boiler of said locomotive engine and appurtenances thereof are in a proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb.

Such was the duty of the defendant here, and it owed that duty to John Groeger, the deceased engineer, in the equipment of and putting and keeping this engine in condition. The question, then, will be whether or not the defendant used this locomotive engine when it was not in proper condition and safe to operate in the service to which it was put so that the same might be employed in the active service of such carrier without unnecessary peril to life or limb. The standard of duty is that they shall put it in proper condition and keep it in proper condition and safe to operate; it is required that it should be put in a condition and kept in a condition so that it might be employed in the service without unneces-

sary peril to life or limb. This is an absolute duty. If the engine, as to the crown sheet was, in fact, permitted to be or to become in a defective, dangerous or unsafe condition, in such a condition that it was not safe to operate in service, or in such a condition that it could not be employed in the active service of the carrier in moving traffic without unnecessary peril to life or limb, that would be a violation of its duties; and if, as a result of such violation of its duties, the explosion occurred, or such failure was a contributing cause, or a direct and proximate cause, along with others, to the explosion and the resultant injury, the defendant would be liable. And that is true, notwithstanding the defendant may have made or caused to be made inspections from time to time as required by the regulations of the Interstate Commerce Commission, or by skilled and competent employees who may have made repairs in accordance with the reports of such inspections. I say, if it, in fact, permitted that condition to come about, and as a result of that condition, in whole or in part, the explosion resulted, then the defendant would be liable.

Now, as to the failure to install a fusible plug, that depends upon different considerations. In other words, whether the standard of safety which is prescribed by that act requires a fusible plug depends upon somewhat different considerations, as to which it is my duty to charge you. If you shall say and find that the standard of duty imposed by the law required a fusible safety plug to be installed, then the absence of the fusible safety plug would impose upon the defendant here an absolute liability, and the plaintiff would be entitled to recover if the absence of it contributed in whole or in part to cause the explosion and the resulting death. The law does not say that locomotive engines thus used shall have fusible plugs in them. The Interstate Commerce Commission has authority to prescribe

regulations for inspections and for equipment under the Boiler Inspection Act, and the Interstate Commerce Commission has not prescribed as a requirement that fusible safety plugs shall be installed on locomotive engines. It becomes, then, a question to be determined by you under the facts and circumstances of this case whether or not the duty to put locomotive boilers in proper condition so as to make them safe requires the installation of a fusible safety plug. Obviously, new appliances and new inventions may be developed from year to year and from time to time for the safe operation of machinery and of locomotive engines and boilers; whether or not they are feasible, and if feasible, whether or not it is practicable to install them are open questions. That question is not to be determined by looking backwards after an accident, but by looking forward.

An interstate carrier, as well as any railroad carrier, owes the duty, of course, of availing itself of the best mechanical contrivances and inventions in known practical use which are or would be effective in making safe a locomotive boiler against explosions. It is not bound to introduce a new appliance the moment somebody suggests it or discovers it, but is entitled to a reasonable time and opportunity to test it out and make any changes.

Such I conceive to be the rules under which you are here to determine whether or not the standard of duty in making this engine safe did or did not require installation of a fusible safety plug. I say to you it is and was the duty of the defendant to avail itself of the best mechanical contrivances and inventions in known practical use which were or are effective in making the boilers safe as against explosions. Now, the question will be whether or not the fusible plug, the existence of which has been known for many years, is in practical use and is reasonably effective for the purpose for which it is intended. Are the limitations upon its use, namely,

the claimed tendency to encourage negligence by the engineer in the operation and conduct of a locomotive, the risks and hazards incident thereto towards the fireman and other employees, the inconveniences, burdens and perhaps dangers from having engines and trains go dead upon a highway of commerce being used at the same time by other engines and trains,—I say, are these considerations offset against the other considerations which are claimed on behalf of the plaintiff? Are they of such a nature as takes the fusible plug as a means of safety upon an engine out of the category of the best mechanical contrivances and inventions known and in practical use and effective as a means of safety in preventing boiler explosions?

In determining that you will take into consideration all the facts and circumstances of the case, and the practice so far as it has been proven to you among railroad men, reasonably prudent and careful railroad operators, what they have done and what their judgment is in regard to the matter, and determine whether or not the fusible safety plug under the law as I have stated it to you was proper and necessary to put this engine in proper and safe condition to operate, and if the operation of it without such fusible safety plug created an unnecessary peril to the life and limb of the employees. If you shall find, under the charge that I have given you, that a fusible safety plug was required by that standard, and that it was a mechanical means and contrivance in known practical use and effective more than was any other that had been installed by the defendant on this engine, then its absence would be a violation of the Boiler Inspection Act, and if the explosion resulted in whole or in part because of the absence of the fusible plug, and the decedent thereby met his death, plaintiff would be entitled to recover.



If John Groeger met his death as a result of the failure of the defendant in either one or both of the respects which I am submitting to you as issues of fact to be determined under the evidence, then he will not be held to have assumed the risk of injury from either or both of those causes, nor will any negligence on his part which may have contributed to cause these injuries or his death bar the plaintiff here from recovery, nor to be taken into account by you in reducing or diminishing her damages.

If, however, gentlemen of the jury, you do not find the defendant was negligent in one or the other of these respects, that is, not guilty of the wrongful conduct and violation of the law as I have stated the law to you, your verdict should be for the defendant. The defendant contends that it furnished the plaintiff's decedent an engine in proper condition and safe in all respects, that there was nothing about it which in its operation imposed an unnecessary peril to the life or limb of the plaintiff's decedent. Unless the evidence by a fair preponderance supports plaintiff's contentions as against these contentions of the defendant, your verdict should be for the defendant. The defendant contends that this engine having thus been furnished in a proper and safe condition, that the handling of that engine thereafter by the decedent was the sole and proximate cause of the death of the decedent, and unless the evidence overcomes that contention of the defendant by a preponderance, it will be your duty to return a verdict for the defendant.

I have said to you, and I repeat, that the negligent or wrongful conduct of the defendant must be either the sole or proximate cause of the decedent's death, otherwise the plaintiff will not be entitled to recover. And by a proximate cause in that connection is meant a cause except for the existence of which the explosion would not have occurred. To be more specific, and as applied to one aspect of the

case, complaint is made that in the crown sheet of this boiler there were six broken stay-bolts and one crown bolt, and that two of these broken stay-bolts were adjacent to each other, whereas the inspection requirements of the Interstate Commerce Commission regulations forbid the use of an engine under the Boiler Inspection Act when there are five or more broken bolts, or where there are two broken bolts contiguous to each other. Even if it should be proved that that requirement of the law was violated, the plaintiff would not be entitled to recover by reason of such violation unless you should further find from a preponderance of the evidence that this specific violation, these specific defects, was either the sole or one of the causes but for the existence of which the explosion would not have taken place. If the existence of these broken stay-bolts had nothing to do with causing the explosion, then you should disregard their existence because, as I say to you, the negligent or wrongful conduct which you may find by a preponderance of the evidence the defendant is guilty of, must have been either the sole or one of the proximate causes of the explosion and of the resultant death of plaintiff's decedent."

Comparison of these charges of the Courts shows that the charge as to the fusible plug is fully defined and concretely stated to the jury and recovery allowed under the claim of statutory violation only in the event the fusible plug was found to be practicable for the prevention of explosions and that the objections to it were overcome by its benefits. This charge is much more favorable to the defendant railroad company in this case than was the charge of the trial court in the *Donaldson* case, where the question of practicability and feasibility of the fusible plug was not left with the jury.

The charge of the trial court in the *Donaldson* case was seriously objected to by the defendant railroad com-

pany in practically the same respects before this Court as in the present case. The construction and interpretation put upon the charge was generally challenged by reason of the Court submitting to the jury to determine the standard of care required under the Act, and whether or not the Act required the installation of a fusible plug. In that case it was the contention of the defendant railroad company that the question of the safe condition of an engine and the question of unnecessary dangers was solely for the inspectors and to be governed solely by the rules promulgated by the operators and by the Interstate Commerce Commission. By virtue of the above, respondent contends that the charge of the Court was eminently fair to defendant railroad company and that the construction and interpretation of the Act involved followed the ruling of this Court in the *Donaldson* case.

(C) The charge of the Court that it was the duty of the defendant to avail itself of the best mechanical inventions in known and practical use for prevention of boiler explosions is eminently fair to the defendant. This Court has held in many cases that the duty required under the Safety Appliance Acts was absolute upon the railroad company and the exercise of the highest degree of care is not a defense for their violation.

*Railroad Company vs. Otos*, 239 U. S. 349;  
*Railway Company vs. Rigsby*, 241 U. S. 33;  
*Railway Company vs. Layton*, 243 U. S. 617;  
*Railroad Company vs. Gotschall, Admr.*, 244 U. S. 66.

(D) Under this heading the brief of petitioner asserts that there was no evidence contained in the record to support the charge of the Court in leaving to the jury

the question of whether or not the crown sheet of the boiler was in a dangerous or defective condition. This testimony has been referred to heretofore in this brief under the claims of statutory violation and negligence of the defendant. Quoting from the record briefly, we find the crown sheet above the firebox was leaking at the front and side. (Record, p. 24, testimony of plaintiff's witness, Bursee.) Both injectors were on and supplying water to the boiler at Foster's Tower, a few miles from where the explosion occurred. (Record, p. 24.) This is not disputed by any witness called by the defendant.

Further, seven broken bolts existed in the crown sheet, which constituted four violations of Rule 25 as announced by the Interstate Commerce Commission. (Record, pp. 18, 19 and 39.) That these broken bolts described could have been discovered by an inspection, and existed prior to the accident, is evidenced by the testimony of defendant's Master Mechanic, McGann. (Record, pp. 18, 19 and 39.) That this condition of broken bolts weakened the internal resistance of the boiler is shown by the testimony of plaintiff's witness, Boyden. (Record, p. 25.) That the condition of the boiler at Moundsville some miles before the explosion occurred is evidenced by the testimony of plaintiff's witness, Bursee, that the engineer asked the dispatcher to be allowed to give up the locomotive, as he was afraid of it, but by the dispatcher was ordered to proceed with the locomotive. (Record, p. 27.)

The existence of the above conditions is evidenced in the opinion of Judge Donahue of the Circuit Court of Appeals in passing upon this case as follows:

"The uncontradicted evidence establishes the fact that at and prior to the time this boiler ex-

ploded there were seven staybolts broken. One staybolt at the forward part of the crown sheet; three intermediate stays on the right side of the crown sheet within a radius of 16 inches, two of which were adjacent. Three on the left side, two of which were within 8 inches of each other and the third within 12 inches of the other two.

The operation of this engine with these broken staybolts was in violation of Rule 25 of the Interstate Commerce Commission in that more than five bolts were broken; in that two of these broken bolts were adjacent; in that three of these bolts on the right side of the boiler were within a radius of eighteen inches and three on the left side of the boiler within a radius of eight inches. It is claimed, however, on the part of the plaintiff in error that there is no evidence whatever that these broken staybolts contributed in any way to the explosion but on the contrary that the testimony of experts tends to prove that they contributed in no way whatever to the tear of the crown sheet and the consequent explosion of the boiler.

Expert evidence in reference to the ultimate question of fact for the determination of a jury may be helpful but is not controlling. Notwithstanding this expert evidence the question was one for the jury to decide from all the evidence whether these broken staybolts caused or contributed to the explosion. That question was properly submitted to the jury by the trial court.

Wholly apart from these broken staybolts there is sufficient evidence in this record as to the defective condition of this engine in other respects, to sustain the verdict of the jury.

It is claimed on behalf of the plaintiff in error that the explosion of this engine was caused by low water. There is evidence in this record tending to prove that the boiler was in a leaking condition; that it was leaking up around the front and the side

—the fire was dead and that when the door of the fire box was open the steam came out with a gush.'

There is also evidence tending to prove that the engine took water at Foster's Tower about three miles from the place where it exploded; that water was supplied from the tank to the boiler by two injectors and that at Foster's Tower both of these injectors were working. If it were conceded that low water caused this explosion, the natural inference from this evidence would be that the engine was in such a defective and leaky condition that water could not be supplied fast enough by these two injectors to keep the crown sheet covered, although it appears from the testimony of the railroad company's master mechanic that with one injector working, the water would be kept above the crown sheet in the normal operation of the locomotive. The evidence also tends to prove the defendant was fully advised of the defective condition of this engine. When the train was at Moundsville, Groeger, the engineer, notified the defendant's train dispatcher that he was afraid of this engine and asked to be relieved of it, but the dispatcher ordered him to continue its use.

It is claimed, however, that this explosion was due solely to the manner in which this engine was operated and not to any defects therein; that if the water was low in this engine the engineer could readily have discovered that fact from the water glass and gauge cocks, and that as soon as the water became dangerously low it was his duty to stop the engine and draw the fire.

The presumption obtains that Groeger was exercising due care for his own safety. This presumption is strengthened by the evidence that he knew the engine was in such a defective condition that he was afraid of it and asked to be relieved from using it. There is no direct evidence in this record that he was negligent in any respect. Nor

does the inference that he was negligent necessarily follow from the facts admitted or proven in this case. It was, therefore, a question for the jury to determine whether this explosion was caused by the manner in which it was operated or by its defective condition in one or more of the particulars in which the evidence tends to show it was defective.

It is also claimed on behalf of the plaintiff in error that the court erred in submitting to the jury the question whether the failure to equip with a fusible plug was a violation of the Safety Appliance Act, for the reason that it is a question to be determined by the Interstate Commerce Commission. That Commission has made no rule or order in reference thereto other than Rule No. 14, which reads as follows:

‘If boilers are equipped with fusible plugs they shall be removed and cleaned of scale at least once every month. Their removal must be noted on the report of inspection.’

The fact, however, that the Interstate Commerce Commission has made no order requiring boilers to be equipped with these plugs is by no means conclusive of the question. It was said by the Supreme Court in *Railway v. Donaldson*, 246 U. S. 121, 128:

‘We find nothing in the Boiler Inspection Act to warrant the conclusion that there is no liability for an unsafe locomotive in view of the provisions of Section 2 of the Act, because some particular feature of the construction which has been found unsafe has not been disapproved by the Federal Boiler Inspector.’

Section 2 of the Boiler Inspection Act provides that it shall be unlawful for any common carrier subject to this Act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic, unless the boiler of the locomotive

and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put without unnecessary peril to life or limb. While the Interstate Commerce Commission is authorized to make rules and orders in furtherance of the enforcement of this law, nevertheless its failure to make a rule or an order covering every defective condition or construction within the meaning of Section 2 of the Boiler Inspection Act by no means relieves the carrier from complying with the provisions of that section.

This issue was presented by the pleadings but it is claimed on behalf of plaintiff in error, that the weight of the evidence directed to that issue, establishes the fact that fusible plugs are not in general use by railroad systems; that they have never been accepted and used by master mechanics and locomotive engineers as standard equipment in locomotive service; that while fusible plugs present an element of safety, and would probably have prevented the explosion in this case, nevertheless they accumulate scale on the top of the plug, and this permits the plug to heat so that the soft metal will melt and run out, causing the engine to fail in service on the line, and that sometimes this results in injury to the fireman, if he should be firing just at the time the soft metal runs out of the plug, permitting the steam to blow the fire and hot cinders out of the door of the firebox and that the presence of a fusible plug tends to negligence on the part of the engineer in failing to keep sufficient water in the engine.

There is, however, substantial evidence in this regard tending to prove that fusible plugs are extensively used; that they may be rounded at the top, so that the scale will not accumulate thereon; that they are generally recognized as effective and reliable means for preventing boiler explosions from low water and that if this engine had been equipped



with a fusible plug this explosion would not have occurred, regardless of the other claimed defects. Upon this state of the proof, it was the duty of the court to submit this issue to the jury. This court has no authority to consider or determine the question of the weight of the evidence.

If, however, it were conceded that there is no substantial evidence in this record tending to prove that Section 2 of the Boiler Inspection Act requires that boilers generally should be equipped with a fusible plug, nevertheless the presence or absence of a fusible plug in this particular boiler was an important fact to be considered by the jury in determining whether this boiler, defective in other particulars, was or was not unsafe to operate in the movement of this train, transporting goods and merchandise in interstate commerce. There is substantial evidence in this record tending to prove that this boiler was defective in the particulars heretofore mentioned; that regardless of these defects it might have been entirely safe to operate if it had been equipped with a fusible plug; but without such plug these defects would render it unsafe and dangerous to operate and unnecessarily imperil life and limb.

While the evidence does not disclose the information given to the train dispatcher by the engineer Groeger, when he asked to be relieved of this engine, as to the nature and extent of the defects, nevertheless, the train dispatcher was advised that in the opinion of the engineer in charge, the engine was defective and dangerous and it was his duty to obtain full information in reference to these defects before ordering and directing that its use be continued for the balance of the trip. Whether he did this or not the defendant must be held to have had knowledge of these particular defects and also knowledge that this engine was not equipped with a fusible plug which, under the proofs of this case,

of  
S.,  
a  
p  
sig  
to  
bra  
cab  
qui  
tra  
cab  
dea  
wit  
of  
tha  
in  
dec  
and  
ure

would not only have mitigated the danger from these defects, but would have actually prevented the explosion.

In determining whether this particular boiler was then safe to operate in the service of the carrier in moving traffic, without unnecessary peril to life or limb, it was proper for the jury to take into consideration, in connection with the other evidence tending to prove its defective condition, the fact that this boiler was not equipped with a fusible plug. That being true, the charge of the court on this subject could not have been prejudicial to defendant.

For the reasons stated, the judgment of the district court is affirmed."

This case is clearly distinguishable from the case of *Great Northern Railway Company vs. Wiles*, 240 U. S., p. 444, cited by petitioner in his brief. In that case a freight train separated by means of the draw-bar pulling out. Immediately on its separation the engineer signalled for the brakeman to go to the rear of the train to protect it and the oncoming passenger train. The brakeman whose duty it was to do this remained in the caboose, wholly failing to protect either train as required by the rules of the Company. The passenger train following crashed into the rear of the train in the caboose of which the brakeman remained, causing his death. The separation of the train had no connection with the accident, which was due wholly to the failure of the brakeman to protect both trains. The record in that case would indicate that the brakeman was asleep in the caboose. Plaintiff submits, therefore, that the decision as announced by this Court in the *Wiles* case, and the reasons therefor are not applicable in any measure to the present case.

**CONCLUSION.**

Summarized, the evidence shows that plaintiff's decedent was using every means provided by the Company with the equipment on the locomotive to supply water to the boiler, and that he was in no way responsible for the disaster that resulted in the use of the engine, having asked to give up the engine at a point several miles before the explosion occurred; that the Boiler Inspection Act, enacted particularly for the safety of employees and the public, was violated in four respects and that the equipment of the engine was inadequate for safety and resulted in unnecessary dangers in its operation.

Respondent, therefore, respectfully submits that the judgment below should be affirmed.

E. C. CHAPMAN,

*Attorney for Respondent.*